

[Constable - Writ of Replevin - Forcible Entry]

**Opinion No. 99- 008**

Robert G. Weaver, Constable  
Northwest Phoenix Justice Court  
11601 North 19th Avenue  
Phoenix, Arizona 85029

January 14, 2000

**SYLLABUS:**

A constable, who is executing a writ of replevin, may not enter into a residence by way of a passkey or locksmith, as this would be considered forcible entry. A justice court does not have the authority to issue an order authorizing forcible entry into a residence to serve a writ of replevin. A constable, while attempting to execute a writ of replevin, may not arrest a person solely for refusing entry into a residence.

Dear Constable Weaver:

You have asked:

- 1) Whether entry into a residential dwelling by a constable executing a writ of replevin, by way of a passkey or locksmith, is considered to be forcible entry?
- 2) Whether it is lawful for a court to issue supplemental orders, in conjunction with a writ of replevin, after a constable or deputy sheriff has peaceably entered a residence and been forced to leave?
- 3) May a constable or deputy sheriff, while attempting to execute a writ of replevin, arrest a person who refuses to allow entry; and if so, under what criminal statute may the person be charged?

In order to respond to your questions, it is first necessary to understand the context in which they are asked. The supporting documents accompanying your opinion request indicate that a writ of replevin is a lawful method utilized by plaintiffs (such as rent-to-own companies) to physically recover their property from one who has not made payments. Under this writ, the plaintiff seeks an order from the court directing a constable or other law enforcement officer to recover the property from the defendant's possession. Based on this factual predicate, your questions are answered below:

1. Is entry into a residential dwelling by a constable executing a writ of replevin, by use of a passkey or locksmith, considered to be forcible entry?

A.R.S. § 12-1172 defines "forcible entry" as: "An entry without the consent of the person having the actual possession."

Under this definition, use of a passkey or locksmith to facilitate the opening of a closed door constitutes "forcible entry" since consent has not been given by the person having the actual possession or entry has not been permitted by law.<sup>1</sup>

2. Whether it is lawful for a justice court to issue a supplemental order in conjunction with a writ of replevin after a constable or deputy sheriff has peaceably entered a residence and been forced to leave?

Replevin is a provisional remedy used by a plaintiff/creditor to recover collateral in which a plaintiff/creditor has a purchase money security interest. Replevin actions are authorized and defined by the replevin statute, A.R.S. §§ 12-1301 through 12-1314, but are also subject to the Provisional Remedies Act (the "PRA"), A.R.S. §§ 12-2401 to 12-2412.

Replevin proceedings are optional and ancillary to the main action in which a plaintiff seeks to repossess specific personal property. A.R.S. § 12-1301. Once a plaintiff has filed an affidavit as prescribed in A.R.S. § 12-1301 and complied with the applicable provisions of the PRA,<sup>2</sup> a justice of the peace has a non-discretionary duty to issue an *ex parte*, prejudgment replevin order. A.R.S. § 12-1302. A constable cannot take possession of property identified in a replevin order until a bond as prescribed by A.R.S. § 12-1303 has been delivered by the plaintiff. See generally *Searles v. First National Bank Arizona*, 127 Ariz. 240, 619 P.2d 749 (App. 1980) (describing the procedures applicable to *ex parte*, prejudgment seizures under Arizona's replevin statute and PRA).

Neither Arizona's legislature nor its courts have specifically addressed the power of a justice court to issue an order authorizing forcible entry in the execution of a writ of replevin. Such power is not directly or expressly conferred by statute. The PRA simply requires service of a copy of the application for an order of replevin and notice to the defendant "in the manner prescribed by law for service of a summons and complaint."

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<sup>1</sup> For purposes of the Arizona Criminal Code, "entry" means "the intrusion of any instrument or any part of a person's body inside the external boundaries of a structure or unit of real property." A.R.S. § 13-1501(2).

<sup>2</sup> The PRA requires, for example, that the justice of the peace must issue a notice informing the defendant of the basis of the plaintiff's claim to the property and of his or her right to a hearing. A.R.S. § 12-2402(E).

A.R.S. § 12-2406(A). The replevin statute provides that an execution may be issued for the delivery of replevined property to a constable and that such executions are subject to the rules governing executions in ordinary cases "so far as they are applicable." A.R.S. § 12-1314(B).

Justice courts are courts of limited jurisdiction. The powers and duties of a justice of the peace are limited to those that are "prescribed by law." A.R.S. § 22-112(1). *State ex rel. Milstead v. Melvin*, 140 Ariz. 402, 406, 682 P.2d 407, 411 (1984) (a justice court is a court of limited jurisdiction which lacks the discretionary authority or injunctive power to fashion a remedy not specifically authorized by statute). Thus, a justice of the peace can only order forcible entry when specifically and directly authorized to do so by statute. For example, justices of the peace are specifically empowered to order forcible entry into a residence to execute a writ of attachment under A.R.S. § 12-1530(D).<sup>3</sup>

In view of such specific statutory provisions authorizing forcible entry for writs of attachment and search warrants, we conclude that the legislature would have included similar statutory language in the replevin statute if it had intended to authorize forcible entry to execute orders of replevin. *See Arizona Bd. of Regents ex rel. the University of Arizona v. State of Arizona Pub. Safety Retirement Fund Manager Adm'r*, 160 Ariz. 150, 157, 771 P.2d 880, 887 (App.1989) (when the legislature has specifically included a term in some places within a statute and excluded it in other places, courts will not read that term into the sections from which it was excluded).

Similarly, the right to replevin property that is subject to a purchase money security interest arises solely under statute. *See First Nat. Bank of Arizona v. Superior Court of Maricopa County*, 112 Ariz. 292, 295 541 P.2d 392, 395 (1975) (the common law remedy of replevin applies only in those cases where there is a tortious taking of property). Thus, if the statute does not provide for forcible entry, we must conclude that none is permitted. Therefore, a justice of the peace has no authority to issue an order whether it is an initial order or a supplemental order authorizing forcible entry into a residence.

A plaintiff/creditor, however, is not without recourse if the defendant/debtor violates an order of replevin by refusing to release the property. First, failure of a constable to execute an order of replevin does not affect the plaintiff's ability to permanently recover the replevined property; an order of replevin is simply an option available to a plaintiff before judgment is rendered in the underlying civil action. The replevin statute specifically addresses situations in which the replevined property has **not** been delivered to the

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<sup>3</sup> Attachment is a provisional remedy that is separate and distinct from replevin and is subject to specific statutory provisions set forth in A.R.S. §§ 12-1521 through 12-1538. Nevertheless, the illustrative pleading provided in the matter improperly cites A.R.S. § 12-1530 (applicable to attachment) in support of a supplemental replevin order.

plaintiff before the final judgment. A.R.S. § 12-1307 authorizes the award of damages resulting from a defendant's detention of the replevined property. A.R.S. § 12-1311 further provides that a party who fails to return property pursuant to areplevin judgment shall be adjudged in contempt of the court and shall continue in contempt until the property is properly delivered. In addition to the replevin statute, A.R.S. § 22-243 provides that a replevin judgment for the recovery of specific articles "shall be that plaintiff recover the specific articles **if they can be found**, and if not, then their value as assessed with interest thereon at the legal rate from the date of the judgment." (Emphasis added.)

Finally, any order directing forcible entry must be considered in the context of its impact on an individual's constitutionally protected rights. See *State v. Fisher*, 141 Ariz. 227, 237, 686 P.2d 750, 760, *cert. denied*, 469 U.S. 1066, 105 S.Ct. 548, 83 L.Ed.2d 436 (1984) (because the unlawful entry of homes by the government was the chief evil that the fourth amendment was designed to prevent, any invasion into the privacy of the home must be given careful scrutiny).

Construing a provisional remedies statute similar to Arizona's, the Supreme Court of Montana found that a deputy's entry into a private residence and seizure of property, without consent or a warrant, violated the search and seizure provisions of the Fourth Amendment to the United States Constitution and the Montana Constitution. *Dorwart v. Caraway*, 290 Mont. 196, 966 P.2d 1121 (1998). The Montana Supreme Court was unable to find that enforcing money judgments and preserving the credibility of the justice system constituted a state interest so compelling as to justify an intrusion into a person's privacy. *Id.*

Based on the above cited authorities, a justice court has no authority to issue a supplemental order authorizing forcible entry into a residence to serve a writ of replevin. The replevin statutes do, however, provide other avenues of recourse if the debtor refuses to release the property.

3. May a constable or deputy sheriff, while attempting to execute a writ of replevin, arrest anyone refusing to allow entry; and if so, under what criminal statute may the person be charged?

In response to your third question, a constable may not arrest a person who refuses entry when a constable is attempting to execute a writ of replevin. As was stated in Arizona Attorney General Opinion I 95-009, footnote 2, "constables are not primarily law enforcement officers" and "a constable has no duty to engage in regular law enforcement activities .... except insofar as his status as a 'peace officer' compels him to act in

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immediate situations or while in furtherance of his primary duties..."<sup>4</sup> Therefore, a constable who is not Az P.O.S.T. certified has no authority to make an arrest under any circumstances. If a constable is Az P.O.S.T. certified he may make an arrest under appropriate circumstances pursuant to his authority as a peace officer. However, simply refusing to allow entry to execute a writ of replevin, without more, may not be an appropriate circumstance for arrest. A justice court, however, may find the property owner in contempt of court for failing to return the replevined property. A.R.S. § 12-1311.

### **Conclusion**<sup>5</sup>

A constable, who is executing a writ of replevin, may not enter into a residence by way of a passkey or locksmith, as this would be considered forcible entry. A justice court does not have the authority to issue an order authorizing a forcible entry into a residence to serve a writ of replevin. A constable, while attempting to execute a writ of replevin, may not arrest a person solely for refusing to allow entry into the residence.

Very truly yours,

MARICOPA COUNTY ATTORNEY'S OFFICE  
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Approved by the Opinion Review  
Committee of the Maricopa County  
Attorney's Office the \_\_\_\_ day of  
November 1999.

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<sup>4</sup> The proposition that a constable or deputy constable must be certified by the Arizona Peace Officer Standards and Training Board ("Az P.O.S.T.") pursuant to A.R.S. § 41-1823(B) to be authorized to perform the duties of a police officer is also discussed in Maricopa County Attorney Opinion No. 96-024.

<sup>5</sup> This opinion supersedes any prior written or oral advice given by this office on this subject.